

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

RESCARE, INC. A/K/A CAMELOT LAKE ^{1/}

Employer

and

Case 9-RC-17815

FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1099 AFL-CIO-CLC

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer owns and operates an intermediate care facility for the mentally retarded located in Fairfield, Ohio, known as Camelot Lake, which is the only facility involved in this proceeding. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent essentially a unit comprised of all regular full-time and part-time direct care providers, and all dietary, laundry and maintenance employees employed by the Employer at its Camelot Lake facility, excluding all RNs, an LPN, technical employees, office clerical employees, and all professional employees, guards and supervisors as defined in the Act. There is no history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer and Petitioner filed briefs with me. The parties disagree with regard to the unit placement of two individuals, the Training Assistant, a position currently held by Stella Ruppert, and the Health Service Coordinator, a position currently held by Allison Lucas. The Employer asserts that Ruppert and Lucas share a community of interest with other unit employees and should be included in the unit. In contrast, the Petitioner contends that both Ruppert and Lucas are supervisors within the meaning of Section 2(11) of the Act. In addition, the Petitioner asserts that Ruppert does not share offices and a community of interest with the other employees in the unit sufficient to warrant her inclusion in the unit. The Petitioner appears to concede that Lucas should be included in the unit if she is not found to be a supervisor.

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded that the Petitioner has not met its burden of establishing that Lucas,

^{1/} The Employer's name appears as amended at hearing.

the Health Services Coordinator, and/or Rupert, the Training Assistant, are statutory supervisors. Additionally, I find no basis to exclude Ruppert from the unit as she shares a sufficient community of interest with other unit employees to require her inclusion in the unit. In reaching this conclusion, I note that because of my findings that the Training Assistant and Health Services Coordinator positions are not supervisory within the meaning of the Act, if I were to exclude only Ruppert from the unit, she could not constitute an appropriate unit by herself leaving her without an opportunity to be represented. *Catholic Orphan Asylum*, 229 NLRB 254 (1977). Accordingly, I have directed an election in a unit of approximately 35 employees, including Ruppert and Lucas.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

Camelot Lake is a 36-bed nursing home providing around the clock intermediate care for the mentally retarded. The actual facility is described as a large building with 9 bedrooms, an activity/great room, a dining area, a kitchen, and a front and back office area. There are a total of 52 individuals employed at the Camelot Lake location but not all of them work on-site. There is another office building, referred to as the ALS building, located approximately one block from the main facility. The supportive living staff for ALS has offices in this building as does ResCare's Executive Director, Angie Mick-Currier, who oversees three programs for ResCare, Inc.: Camelot Lake, Williamstown and ALS. In addition, the Human Resource Director, Dwight Finch, an unidentified Business Manager, Staff Development Director, Lataya Kirby, and Stella Ruppert, Training Assistant,^{2/} have offices in the ALS building.

The patient care staff at Camelot Lake consists of the Program Director, 3 Home Managers, 1 Support Service Manager, RNs, 2 QMRPs, 1 Health Services Coordinator, 1 Training Assistant, 27 Professional Service Providers (PSP), 1 Maintenance employee, and an unidentified number of laundry and dietary employees. Two staff members, Michelle Platt and Carrie (the record does not reflect her last name), who are classified as QMRPs, are responsible for writing programs for each one of the residents that spell out, in detail, what each resident should be doing on a daily basis, from their dietary and hygiene needs to any physical activity they must accomplish. The QMRPs share an office located just off the great room that is kept locked when it is not being used by the QMRPs.

Ruppert has an office at the ALS building as does her supervisor. However, the record discloses that Ruppert spends about 50% of her time at Camelot Lake. Lucas has access to an unlocked office/cubicle in the main building next to the QMRPs office. The transcript is silent as to the hours or shifts that Ruppert and Lucas work.

^{2/} The record discloses that up until about 6 months ago Ruppert's office was on-site at Camelot Lake but a state licensure survey suggested that Camelot Lake needed more space for the residents and therefore training records and Ruppert were transferred to the ALS building.

The majority of the unit sought by the Petitioner is comprised of Professional Service Providers (PSP). There are approximately 27 PSPs employed by the Employer and each is assigned to one of the 9 patient rooms during each of the three shifts. Each room houses four residents. The immediate supervisors of the employees in the patient care areas appear to be somewhat different. For example, Ruppert is supervised by the Staff Development Director. The PSPs' direct supervisors are the home managers.^{3/} The dietary employees report directly to the support service supervisor while maintenance personnel and Lucas are both supervised by the program director.

Ruppert, Lucas and other unit employees share common working conditions. Patient care staff members do not wear uniforms nor do they wear badges identifying their positions. The PSPs, and the maintenance, laundry and dietary employees, as well as Ruppert and Lucas, are all paid on an hourly basis while all other staff members are salaried. The record reflects that Ruppert and Lucas receive the same benefits as other hourly employees.

The record is silent as to what shift each staff member works or the supervisor on duty at any given time, but it seems, absent an unusual situation, at least one home manager is on duty during each of the three shifts and the PSPs acknowledge that the home managers are their direct supervisors. It appears from the record that RNs are also considered supervisors and at least one RN is on duty at all times.

There was some conflicting testimony about Lucas being used as an on-call supervisor by the Employer. One employee testified that she believed Lucas had been the on call supervisor in the past but was unable to provide any example when this was the case. The Executive Director testified that the only staff members responsible for being on-call are the program director, QMRPs, the support service supervisor and the home managers, and added that Lucas had never been an on-call supervisor. The on-call staff rotate from week to week and can be used for various reasons from an unforeseen incident with a resident to situations where too many employees call off and the current staff needs help. The on-call staff members received Employer issued pagers for the purpose of being "on-call" and Lucas did not receive one.

The programs developed by QMRPs for each resident are compiled and placed in a living unit record (LUR) binder. Included in the LUR is everything about the resident including behavior sheets, meal book, physical development and hygiene records. The LUR seems to be an extremely important document in tracking the programs and progress of the residents in all areas of their life. A LUR is kept for each resident in the resident's room and it is the responsibility of the PSP or any staff member working with a resident to follow the programs as written by the QMRPs. The PSPs must continually review the LUR to ensure the appropriate programs are being completed by the resident. The LUR is how the PSP indicates that a resident's program has been completed. After a program is completed, the PSP places their initial in the proper location on the LUR. The record also discloses that at the front of the LUR there is a sign off sheet where the PSPs are required to sign their name to show that they have worked the particular shift.

^{3/} The parties have not taken any position on the supervisory status of the home managers and the record is silent regarding their duties. However, it appears that the parties consider them to be supervisors.

The LUR documentation is kept for both training and regulatory purposes and must be filled out to show that each employee was assigned to an individual that day. When no employee has signed the LUR for a certain day, there is a process where someone goes through the LURs and fills out a single, non-carbon, sheet of paper, “pink slip” that names the employee and indicates the dates they need to check. It is not always the same employee who does this but Ruppert frequently take on this responsibility. This document is not retained anywhere and after the employee puts his or her name in the proper place, the pink slip is discarded by the employee.

II. HEALTH SERVICE COORDINATOR

Lucas has worked at the Camelot Lake facility since 1989. It is undisputed that she is very knowledgeable about what goes on at the facility, has the authority to control and handle residents, and knows the procedures employees, especially PSPs, should use in carrying out the patient programs as directed in the LUR by the QMRPs. Lucas’s expertise is in the exercise and physical development for the residents. Lucas has only a high school degree and has never received any type of formal training for her position; she has gained her knowledge from her experience at Camelot Lake over the last 14 years. The record is silent on how long Lucas has been in the position of Health Service Coordinator or if she originally worked as a PSP.

Unlike the PSPs, Lucas is not assigned to any particular resident’s room and works with numerous residents throughout the day. She is primarily in charge of ordering and fixing the equipment or products that the residents use for their programs, such as wheelchairs, leg and shoe braces, splints, wedges or any special item the resident might need. On a daily basis, Lucas conducts exercising programs for residents to increase their range of motion or improve their physical development. She also positions residents to make them more comfortable and periodically conducts training for PSPs on the use of the equipment. When Lucas is not treating an individual resident, she primarily does wheelchair and brace fittings and repairs or takes residents out of the facility to doctor’s appointments and similar activities. If Lucas isn’t doing one of these tasks, she will typically assist the PSPs in performing their tasks. Testimony from a PSP described Lucas as very knowledgeable and willing to helping out any time she was needed and that “she (Lucas) does a little bit of everything from helping the PSPs get residents off the bus to assisting in the dining room.” The record also disclosed that Lucas has filled in for absent PSPs in the patient’s room approximately 17 times over the past three months. Lucas is paid on an hourly basis and has the same benefits as all other hourly employees.

Lucas and Ruppert are the only hourly employees who have a desk. Lucas’ desk is in the Employer’s great room and she has her own phone extension. Her office is located near the QMRP’s locked office, but her office is described as an unlocked cubicle with partitions for walls. Lucas uses her office to store the parts and tools she needs for the equipment she maintains. Lucas does not have a computer at her desk nor was there any testimony that she performs duties other than equipment repair in this area. The record reflects that the maintenance employee, whom the parties agree is included in the unit, assists Lucas in repairing the residents’ equipment, but the time the two spend together making such repairs is not evident from the record.

The record reflects that the PSPs relies upon Lucas for guidance in the performance of their duties. One employee testified that she automatically goes to Lucas if there are problems with one of her residents such as a tight fitting brace, the sole of a shoe coming undone, or when she notices physical problems such as a resident with “dry elbows.” However, the PSP states that when she goes to Lucas with problems on most occasions Lucas performs the task herself. On one occasion, when a resident’s program called for the individual to use a self-propelled wheelchair instead of the electric powered chair he had been using, and thereafter began falling out of the self propelled chair, the PSP asked Lucas if the resident could resort back to the other chair. Although the LUR called for the self-propelled chair to be used, Lucas agreed with the suggested switch until other arrangements were made. Lucas also once reminded a PSP to put straps on a resident to keep the resident from falling. The witness testified, however, that she would have immediately put the straps on without Lucas reminding her but she just hadn’t noticed the problem. In the same respect, a PSP testified that she has gone to Lucas several times about equipment because she didn’t understand how to use the equipment and Lucas would explain what to do. As an example, a PSP could not locate a certain size sling that she needed for a resident. Worried that the larger size sling might not be appropriate for a resident because of his weight, the PSP asked Lucas if she thought the next size would work. Lucas simply agreed, based on her experience, that a larger sling would be fine. Again, Lucas was assisting a PSP in utilizing equipment, her specialty, not using independent judgment in treating a patient.

Lucas does not schedule shifts, breaks or assign work to the PSPs or any other employees. There was some testimony, however, that Lucas on one occasion arranged the work schedule for the PSPs because four PSPs failed to report to work. On this occasion, Lucas took over the schedule that day, made sure all residents’ rooms were staffed, made sure dinner was served and that the floors were staffed during schedule breaks for the PSPs. However, Lucas did not switch the rooms regularly assigned to the PSPs but only made sure that all residents were covered. On one other occasion, a PSP asked Lucas if she could take a break because she was unable to find her supervisor. Lucas told her it would be fine. The record, however, does not indicate whether this isolated incident involved the use of independent judgment by Lucas.

Moreover, the record reflects that Lucas, on occasion, directly works with residents. In this regard, she takes them out of the facility for doctor’s appointments, to the hair salon or similar outings. The record does not reflect how frequently this occurs. Lucas has also worked approximately 17 times in the past three months as a PSP, performing the same duties as other PSPs.

There is no evidence or contention by the Petitioner that Lucas possess any other supervisory indicia. She does not have the authority to hire, discharge or discipline employees or to recommend such action. She does not reward or recommend employees for pay increases or adjust employee grievances. Like the other unit employees, Lucas is hourly paid and is entitled to the same benefits as the PSPs and other hourly employees.

III. TRAINING ASSISTANT

Ruppert has been the training assistant for approximately 6 months. Prior to that she was an assistant to the QMRPs. The staff development director, Lataya Kirby, is Ruppert’s direct

supervisor. Although the record is silent as to what duties she performs for Kirby, Ruppert is considered by many to be her assistant. It is undisputed that Kirby is responsible for hiring PSPs for Camelot Lake. However, the record shows that Ruppert does not have anything to do with Kirby's decision to hire such employees. Once a PSP is hired, Ruppert's main responsibility is to conduct employee training and continually update the employees on such issues as personal hygiene of residents, communicating with them, teaching staff how to work with individuals affected by mental retardation and the residents' rights. This training is usually done at the ALS building. The Union argues that Ruppert's instructions on how to care for a resident with behavior problems requires independent judgment. However, the PSP, who testified about this matter, did not testify that Ruppert's direction changed her daily performance as suggested by the Petitioner. Her testimony disclosed Ruppert suggested different techniques on how to handle the resident using basic training not independent judgment.

The record reflects that Ruppert's work time is divided evenly between working at the Camelot facility and the ALS building. However, the precise nature of all her duties at Camelot is unclear. It appears that when at Camelot, Ruppert periodically checks the LURs to see if employees, typically PSPs, accurately filled in the documentation on the residents. If the forms are not correctly completed, Ruppert corrects the form calling the PSPs attention to the overlooked areas. This form or "pink slip" that the PSP receives from Ruppert identifies the date and missing information. Ruppert allegedly goes over the LURs a few times a month checking for missed information. It is noted, however, that Ruppert is not the only staff member that checks LURs. Periodically, a few times a month, Ruppert and another staff member examines the LURs to determine whether they have been correctly filled out by the PSPs. If the LURs are missing documentations, the PSPs receive a "pink slip" and are instructed to provide the correct information. Once the PSPs do so, the "pink slip" is discarded. Although PSPs, who continuously receive "pink slips" may be disciplined, Ruppert makes no recommendation of discipline when she completes the "pink slip."

IV. THE LAW AND ITS APPLICATION REGARDING SUPERVISORS

(a) Legal Overview

Section 2(11) of the Act defines a supervisor as a person:

... having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

In enacting Section 2(11) of the Act Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." See, **Senate Rep. No. 105, 80th Cong., 1st Sess. 4**, reprinted in **1 NLRB**

Legislative History of the Labor Management Relations Act, 1947. See also, *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985); *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *KGW-TV*, 329 NLRB 378 (1999). Thus, the exercise of “supervisory authority” in merely a routine, clerical or perfunctory manner does not confer supervisory status. *Feralloy West Corp. and Pohang Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, in the event that “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusory evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittenton Hospital*, 328 NLRB 879 (1999), or testimony, *Sears, Roebuck & Co.*, 304 NLRB 193 (1991), is insufficient to establish supervisory status. Thus, where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by such general conclusionary words or whether an individual engaging in these activities is required to exercise independent judgment. For example, as the Seventh Circuit noted in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970), there is enough play in the meaning of such terms that the Board is not bound to equate them with supervision in the statutory sense.

In reaching my decision with respect to the supervisory status of Lucas and Ruppert, I must apply the principles established by the Board in the above cases as well as the holding of the Supreme Court in *Kentucky River Community Care, Inc.*, 352 U.S. 706 (2001). Initially, in *Kentucky River*, the Supreme Court approved the Board’s well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 710. Here, the Petitioner asserts Lucas and Ruppert are statutory supervisors and therefore bears the burden of proof to establish supervisory status.

A statutory supervisor must possess, as noted above, at least, one of the indicia specified in Section 2(11) of the Act. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 710; *Queen Mary*, 317 NLRB 1302 (1995); *Allen Services Co.*, 314 NLRB 1060 (1994). Moreover, a statutory supervisor must exercise supervisory indicia in a manner requiring the use of independent judgment. With respect to most Section 2(11) indicia, the use of independent judgment is self-evident. However, when considering the supervisory authority to responsibly direct or assign work, it is more difficult, particularly in the health care industry, to define the use of independent judgment. In the health care field, the Board previously held that employees do not use independent discretion when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer specified standards. In *Kentucky River*, the Supreme Court rejected this categorical exclusion. Rather, the Supreme Court found that such a categorical exclusion was improper, overbroad and “contrary to the statutory language.” *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 714.

Although the Supreme Court rejected the Board's categorical exclusion of professional judgment from Section 2(11) independent judgment, it did accept two aspects of the Board's interpretation of independent judgment. The Supreme Court agreed with the Board that the statutory term "independent judgment" is ambiguous and that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 714. The Supreme Court also recognized that judgment may be reduced below the statutory supervisory threshold by detailed regulations issued by an employer. *Id.* See also *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001) (citing *Kentucky River*). Moreover, in *Kentucky River*, the Supreme Court held that the Board has discretion to determine the scope of judgment that qualifies as independent judgment within the meaning of Section 2(11) of the Act.

In *Kentucky River*, the Supreme Court noted that the Board defended its categorical exclusion based on policy considerations because it sought to preserve the inclusion of professional employees within the coverage of the Act. *NLRB v. Kentucky River Community Care Inc.*, 352 U.S. at 713. The Supreme Court found that the question presented did not involve the soundness of that labor policy which the Board was entitled to judge without second-guessing by the Court. Rather, the Supreme Court noted that the policy could not be given effect through the categorical exclusion of professional judgment from the meaning of independent judgment contained in Section 2(11) of the Act. The Supreme Court, citing *Providence Hospital*, 320 NLRB 717, 729 (1996), went on to suggest that the policy favoring the Act's coverage of professional employees might be accomplished by developing a "limiting interpretation of the supervisory function of responsible direction" that distinguishes employees who direct the manner of others' performance of discrete tasks from employees who direct other employees. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 714.

As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Star Trek: The Experience*, 334 NLRB No. 29, slip op. at 6 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB No. 59, slip op. at 1 (2001); *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000). The following is an examination of the Section 2(11) criteria applicable to the facts in this case.

(b) Consideration of Supervisory Indicia

The Petitioner argues, in its brief, that Ruppert and Lucas are statutory supervisors because "they have the authority to responsibly direct the work of the bargaining unit employees." The Petitioner does not contend, and the record does not contain any evidence, that Ruppert and Lucas possess any other indicia of supervisory status. Accordingly, I will only address, the Petitioner's contention that Ruppert and Lucas responsibly direct employees by exercising independent judgment.

Training Assistant – Stella Ruppert:

The Petitioner appears to argue in its brief that Ruppert responsibly directs PSPs' work when she reviews the LUR and issues the "pink slips" to correct any missed documentation. Ruppert's responsibility for filling out the missed documentation forms and calling it to the attention of the employees is nothing more than a simple notice to the employee and has no direct adverse impact on the employees' terms and conditions of employment. The authority to caution employees about their conduct in such a manner is not considered to be discipline and does not establish supervisory authority. See, e.g., *Alois Box, Co.*, 326 NLRB 1177, 1178 (1998); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1077 (1985). Moreover, the ability to give notices which themselves have no adverse impact on an employee's employment status are not considered indicative of supervisory status. See, e.g., *Heritage Hall, E.P.I. Corp.*, 333 NLRB No. 63, at slip. op. 2 (2001); *Ken-Crest Services*, 335 NLRB No. 63, at slip op. 2 (2001).

The Petitioner asserts in its brief that Ruppert has the authority to "diverge from work directions contained in LURs" and that she utilizes independent judgment when doing so. I disagree. In support of its position, the Petitioner refers to an incident involving a blind resident and a LUR requiring him to use a container for his clothing and a resident with "behavioral problems." Neither incident establishes that Ruppert possesses supervisory indicia.

With regard to the container, Ruppert was merely interpreting the LUR for the PSP who had failed to understand that the picture of a container on the LUR meant that the resident was to use a container for clothing. Ruppert's instruction did not amount to her directing the PSP to "diverge" from the LUR. Similarly, any instruction she may have given to a PSP on how to care for a resident with behavioral problems is more akin to the direction of tasks with no evidence that it required the use of any independent judgment and falls far short of establishing supervisory status *NLRB v. Kentucky River County Care, Inc.*, 352 U.S. at 714.

Health Services Coordinator – Allison Lucas:

It appears that PSPs view Lucas as a trusted, skilled and knowledgeable employee. Therefore, they approach her for suggestions on how to perform their tasks or when they are having difficulty with equipment. However, the advice or direction that Lucas imparts to them is routine and not the exercise of management prerogative. Rather, it is more akin to the type of instruction given by an experienced employee to one with less experience.

For example, if a PSP has a problem with a resident's brace or wheelchair or performing physical activities with the resident, they may ask Lucas for advice. For example, a PSP once reported to Lucas that a resident was having a problem with "dry skin." On another occasion, a PSP told Lucas that a resident was having difficulty operating her wheelchair. On each of these occasions Lucas suggested to the PSP what could be done to solve the problem. This type of action where Lucas is simply suggesting what can be done is not the exercise of independent judgment on Lucas' part but rather is direction based on her experience. Similarly, Lucas' direction to an employee to deviate from a program by allowing the patient to return to an electric powered wheelchair was routine in nature requiring little, if any, independent judgment. In this situation, the PSP explained to Lucas that the resident was falling out of the self-propelled

chair and that something had to be done so he wouldn't continue to hurt himself. Lucas simply suggested the obvious, that the resident should stay out of the chair. Such routine direction and assignment of employees is not considered indicative of true supervisory authority. See, e.g., *Sears Roebuck & Co.*, 292 NLRB 753, 754-55 (1989).

The record reflects that Lucas, on one occasion, substituted for a Home Manager when two Home Managers failed to report to work. It is not clear from the record whether the Employer appointed her as a substitute or whether she assumed the responsibilities on her own initiative. In any event, sporadic, and isolated substitution for a statutory supervisor is not sufficient to confer supervisory status. See, e.g., *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000); *Latas De Aluminio Reynolds, Inc.*, 276 NLRB 1313 (1985).

(c) Consideration of Secondary Supervisory Indicia:

Although certain facts, such as Lucas and Ruppert having their own desk, especially Ruppert being located at the ALS building, private telephone lines, or that some employees were supposedly told that they should follow their instructions may arguably be viewed as some indication of special status, such so called, "secondary indicia" do not indicate supervisory status, absent the existence of one of the primary indicia found in Section 2(11) of the Act. *Chrome Deposit Corporation*, 323 NLRB 96, fn. 9 (1997); *North Jersey Newspapers Co.*, 322 NLRB 394 (1966); *Billows Electric Supply*, 311 NLRB 878, fn. 2 (1993).

The training tasks performed by Lucas and Ruppert may arguably support, to an extent, a finding of supervisory status. However, the training of employees is not an element of supervision in Section 2(11) of the Act. The responsibility of training employees as revealed in the record does not in any way support a finding that Ruppert or Lucas effectively directed other employees' work. Rather, it appears that they were simply conveying the knowledge they have learned while working for the Employer to other employees. The Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, e.g., *The Washington Post Co.*, 242 NLRB 1079 (1979); *Ball Plastics Division*, 228 NLRB 633 (1977); *House of Mosaics, Inc., Subsidiary of Thomas Industries, Inc.*, 215 NLRB 704 (1974); *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057 (1971).

(d) Supervisory Conclusion:

Based on the foregoing and the record as a whole, I find that the Petitioner has failed to meet its burden of establishing that Ruppert and/or Lucas are supervisors within the meaning of Section 2(11) of the Act. In reaching my conclusion, I note that the Petitioner has not cited any precedent which supports its position that Ruppert and Lucas are supervisors.

V. COMMUNITY OF INTEREST:

Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Company*, 91 NLRB 409, 418

(1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966).

The appropriateness of a given unit is governed by community of interest principles. In analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision; and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999). In addition, the Board considers whether the employees, if excluded, would constitute a separate appropriate unit or would be more appropriately included with other employees not within the unit. *Overnite Transportation Co.*, *supra*.

The record reflects that Lucas' position as the health services coordinator is functionally integrated with that of the PSPs and to some degree the maintenance personnel in the unit. Lucas interacts with all of the PSPs on a daily basis and her job responsibilities include working with all of the residents and assisting the PSPs. One employee testified that Lucas helps PSPs when they have problems with equipment and she will come in and work "side by side" with them. Furthermore, both Lucas and the maintenance employee make minor repairs on wheelchairs. More importantly, Lucas actually has worked as a PSP approximately 17 times in the past three months. Like the PSPs, Lucas is hourly paid and is entitled to the same benefits. The Petitioner does not contend that Lucas lacks a community of interest with the other employees. Accordingly, I find that Lucas shares a substantial community of interest with the other employees and must be included in the unit.

Although Ruppert doesn't seem to spend as much time with the PSPs as Lucas, her job still requires her to interact with them regularly and she is responsible for training them in their job duties. In addition, the interaction Ruppert has with the residents, such as taking them on outside trips, is closely related to the functions performed by the PSPs. Ruppert divides her time evenly between the ALS building a block away, and the Camelot facility working with residents. Like the PSPs and Lucas, Ruppert is hourly paid and is entitled to the same benefits. Thus, the record discloses that Ruppert shares similar conditions of employment and has substantial contact with other unit employees. Finally, if I were to include Lucas but exclude Ruppert from the unit, it might well result in the creation of a residual unit of only one employee with no community of interest with other unrepresented employees, effectively denying Ruppert of the opportunity for representation, a result inconsistent with the purposes and policies of the Act. *MDS Courier Service, Inc.*, 242 NLRB 405 (1979); *Vecellio & Grogan*, 231 NLRB 136 (1977); *Victor Industries Corporation*, 215 NLRB 48 (1974). Any differences between Ruppert and other employees in the proposed unit is minimally significant when compared to the otherwise strong community of interest shared between Ruppert and the other unit employees. For all these reasons, I find that Ruppert must be included in the unit.

VI. CONCLUSIONS:

Based on the absence of any primary indicia of supervisory status, I find that Lucas and Ruppert are not supervisors within the meaning of Section 2(11) of the Act. In this regard, the record does not disclose any evidence that Lucas or Ruppert use independent judgment in directing PSPs to perform certain tasks or in modifying their assignments. Moreover, they do not possess any other indicia supervisory authority. Additionally, the record shows, and I find, that Lucas and Ruppert have a sufficient community of interest with other employees to require their inclusion in the unit. In reaching my conclusions, I note that the Petitioner has not cited any case authority which would warrant excluding Ruppert and/or Lucas from the unit.

VII. EXCLUSIONS FROM THE UNIT

The record reflects that the Employer employs various individuals at Camelot Lake whose job title and general duties suggest that they are supervisors or managers.^{4/} However, there is no stipulation or agreement as to their status and I have not made a specific finding regarding their classifications.

VIII. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer in Case 9-RC-17815 constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular full-time and part-time direct care providers (PSPs), the training assistant, the health service coordinator, and all dietary, laundry and maintenance employees employed by the Employer at its Camelot Drive,

^{4/} The titles referred to in the record are the Executive Director, Human Resources Director, Business Manager, Staff Development Director, Program Director, Home Managers, Support Service Supervisors and QMRPs.

Fairfield, Ohio location, excluding all RNs, LPNs, technical employees, office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

IX. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Food and Commercial Workers Union, Local 1099, AFL-CIO-CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining whether there is an adequate showing of interest. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to

all parties to the election, only after I have determined that an adequate showing of interest exists among the employees in the units found appropriate.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 18, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

X. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 25, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 11th day of July 2003.

/s/ Earl L. Ledford
Earl L. Ledford, Acting Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

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